IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 427 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VINODBHAI SHANABHAI VASAVA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 427 of 2001

MR YOGESH S LAKHANI for the appellant

MS NANDINI JOSHI, APP for the Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE J.R.VORA

Date of decision: 14/02/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

The appeal was notified for admission hearing before the Division Bench comprising K.R.Vyas & Akshay H. Mehta, JJ., on December 14, 2001 and after hearing the learned counsel for the appellant, the Court had passed following order :-

"Admit.

For considering the question of bail, notice to learned P.P. returnable on 26.12.2001. Mr. H.H.Patel, learned A.P.P. waives service of notice.

Office is directed to call for the R.& P. so as to reach this Court on or before date of hearing. In the meantime, ld. counsel for the appellant shall also supply paper book containing relevant evidence to the otherside."

2. As the Court has issued notice to the learned P.P. for considering the question of bail, the matter has been notified before us.

3. The learned counsel for the appellant states at the Bar that he has specifically obtained instructions from the appellant and in view of the specific instructions, he does not challenge the finding recorded by the learned Judge of the Trial Court that the appellant had given knife blow to the deceased on the left side of his chest. The learned counsel for the appellant further states that the appeal be considered only for the purpose of deciding the question whether the appellant has committed offence punishable under section 304, Part-I of the Indian Penal Code as held by the learned Judge, or section 304 Part-II of the Indian Penal Code. Under the circumstances, though the appeal is notified before us for considering the question of bail, we have taken-up the appeal for final disposal.

4. In this appeal, which is filed under section 374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated May 1, 2001, rendered by the learned Sessions Judge, Bharuch, in Sessions Case No. 33/99 by which he is convicted under section 304, Part-I of the Indian Penal Code and punished with imprisonment for 12 years and fine of Rs.200/- i/d. imprisonment for one month.

5. The incident in question had taken place opposite Khappar Mata Mandir, situated in the area known as Bhaliawad of Bharuch Town at about 1.00 A.M. on

September 28, 1998. According to the complainant, his two brothers had gone to see Garba and on hearing uproar,he had rushed to the place of incident and seen the appellant inflicting knife blow on the chest of his brother Jitesh. Deceased Jitesh was taken to Civil Hospital in a rickshaw, where he was declared dead. The motive alleged by the complainant for commission of the crime was that on the previous day while playing Garba at Dholikui Bazar, hands of Mehul, who is brother of the complainant and hands of the appellant had collided with each other, which was followed by hot exchange. The complainant had lodged complaint with P.I. Mr.Chavda, who was then in charge of Bharuch City 'A' Division Police Station. After necessary investigation, the appellant and others were chargesheeted for the offences punishable under sections 302, 147, 148, 149, 307, 120-B of the Indian Penal Code and section 135 of the Bombay Police Act. The case was committed to Sessions Court, Bharuch for trial, where it was numbered as Sessions Case No.33/99 and the learned Judge had framed charge against the appellant and others at Exh.8. The charge was read over and explained to the accused, who had pleaded not guilty to the same and claimed to be tried and, therefore, several witnesses were examined on behalf of the prosecution. After considering the evidence adduced by the prosecution, the learned Judge by judgment dated May 1, 2001 has convicted the appellant under section 304 Part-I of I.P.C. and imposed punishment which is referred to earlier, giving rise to the present appeal.

6. As observed earlier, the learned counsel for the appellant has not challenged the finding recorded by the learned Judge that it has been established by leading reliable, clear and unimpeachable evidence that the appellant had inflicted a knife blow to the deceased on left side of the chest. Though the learned counsel has not challenged this finding on merits, we have gone through the entire evidence on record to satisfy ourselves as to whether the said finding recorded by the learned Judge is borne out from the record of the case or not. On reappreciation of evidence, we find that in view of the evidence of (1) complainant Chandrakant Sakalchand Rana, PW.1 Exh.22, (2) Kirit Hasmukhbhai Rana, PW.8 Exh.42, (3) Punambhai Naginbhai, PW.9 Exh.43, (4) Kaushikbhai Khushalbhai Patel, PW.10 Exh.44, (5) Rakesh Tusharbhai Patel, PW.11 Exh.45 read with the evidence of Dr. Ashokkumar Parmanand Gupta, PW.4 Exh.27 and Dr. Jitendra V.Patel, PW.26,Exh.82, who had treated injured complainant Chandrakant, there is no manner of doubt that the prosecution has proved by leading cogent, reliable and consistent evidence that the appellant had inflicted

a knife blow on left side of chest of the deceased and the said finding is hereby upheld.

7. While considering the question as to which offence is committed by the appellant, the learned Judge has drawn conclusions in Paragraphs 31 to 34 of the impugned judgment. They are as under :-

"31. The question to be considered is whether itis a case of culpable homicide amounting to murder or culpable homicide not amounting to murder. Following circumstances of the present case would show that the present case is a case of free fight.

(a) Almost all the witnesses are accused in a cross-case arising from the same incident. It is Sessions Case No. 130/99.
(b) All eye witnesses are the residents of same area where the incident had occurred.
(c) All and other accused persons are also residents of nearby area. All accused and eye witnesses are residents of Dholikui Bazar.
(d) PW.8 says that fight continued for about five minutes after the knife blow was inflicted on the deceased cross-exam.(cross-exam. para-7).
(e) PW.10 says that incident lasted for about ten minutes (cross-exam. para-3).
(f) PW.9 also says that when mob came, the complainant party persons were there (para-5).
(g) Dr.(PW.4) in his evidence says that when deceased and the complainant and other injured persons were brought to the hospital, at the same time, injured accused persons, came to the hospital and he had treated them (para-20).
(h) The evidence of I.O. in this regard is clear. He says that the accused persons had also received the injuries. Cross-case is filed against seven accused persons, including the deceased. He says the complainant and others are accused in the cross-case.

32. In view of the above, it is a case of free fight. The version of defence that two incidents are separate and distinct is not possible to believe. However, it is difficult to say that case would fall under Exception of free fight, as provided in Section 300 of I.P.Code.

33. The facts of the present case comes very closely to the case of State of H.P. vs. Wazirchand case, AIR 1978 SC 315. Following is the quot appearing in the commentary of IP Code by Justice Jaspalsing 1998 Edition

page 548 :

"......Where in a sudden fight between the two groups upon sudden quarrel flowing from earlier incident, both sides attack each other and one person was fatally wounded by the accused by dangerous weapon like knife, it was held that offence would one falling under Part-I of Section 304 of IP Code."

34. Wazirchand case is possible to distinguish. In that case, the Court was pleased to believe that case on hand to be one falling under Exception of free fight as provided in Section 300. However, it would appear from the above quot, in many respects, present case, comes close to Wazirchand case."

8. The learned counsel for the appellant submitted that as held by the learned Judge himself, this is a case of free fight and, therefore, the learned Judge committed an error in holding that the act by which the death was caused, was done by the appellant with the intention of causing death, or of causing such bodily injury as was likely to cause death and, therefore, the offence would be one punishable under section 304 Part-I of I.P.C. What was emphasised was that apart from this being a case of free fight, 7 accused persons including the appellant were injured in the incident and as no explanation is offered by any of the prosecution witnesses regarding injury sustained by the appellant and others, there is no manner of doubt that the genesis of incident is suppressed by the prosecution and, therefore, the appellant should not have been convicted under section 304 Part-I of I.P.C. The learned counsel pointed out that the learned Judge has held that in the heat of excitement and that too in the midst of free fight, the appellant had given one blow to the deceased and, therefore, it should be held that the appellant has committed offence punishable under section 304 Part-II of I.P.C.

9. Ms. Nandini Joshi, learned A.P.P. on the other hand pleaded that the evidence on record establishes that there was quarrel between the accused party and the prosecution party and in such circumstances, when the appellant had given blow with a dangerous weapon on vital part of the body of the deceased, it should be held that the offence committed by the appellant would fall under section 304 Part-I and not under section 304 Part-II of the Indian Penal Code as pleaded by the learned counsel

for the appellant. According to the learned A.P.P., there was free fight between two groups preceded by an earlier incident and in the free fight, both the sides had attacked each other and as the deceased was fatally wounded by the appellant by a dangerous weapon like knife, it should be held that the offence would fall under Part-I of Section 304 I.P.C. What was emphasised was that the medical evidence on record establishes that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause his death and, therefore, having regard to the totality of the facts and circumstances of the case, the learned Judge was justified in convicting the appellant under section 304 Part-I of I.P.C. and the said finding should not be disturbed by the Court in the present appeal. In support of her submissions, the learned counsel has placed reliance on the decisions in (i) Bachan Singh and others v. State of Punjab, AIR 1993 SC 305, and (ii) Dwarka Prasad v. State of U.P. 1993 Suppl.(3) SCC 141.

10. We have considered the rival submissions advanced at the Bar as well as the evidence on record. From the deposition of eye witness Kirit Hasmukhbhai Rana, PW.8 Exh.42, it is manifest that first of all a free fight had taken place between the accused party and the prosecution party and in the heat of excitment, the appellant had given one knife blow on the left side chest of the deceased. It is the settled law that in free fight each accused would be liable for the individual act attributed to the particular accused. The evidence of Dr. Ashokkumar Parmanand Gupta, PW.4 Exh.27, who had performed autopsy on the dead body of the deceased, establishes beyond reasonable doubt that he had also treated seven accused including the appellant on September 29, 1998. Those accused, who were treated and examined by Dr.Ashokkumar P. Gupta, were (1) Prahladbhai Indravadan Rana, (2) Manoj Ravji, (3) Rajeshbhai, (4) Vinod, (5) Gautambhai Shanabhai, (6) Vinod Shanabhai (appellant), and (7) Maheshbhai Natvarbhai. The evidence of the Doctor further establishes that on examining the appellant, he had found that the appellant had sustained injuries in the centre of parietal region, on right elbo and a incised wound on left hand. It is relevant to notice that in cross case i.e. Sessions Case No.130/99, the prosecution witnesses,namely, (1) Jignesh, (2) Rajesh Chandubhai, (3) Kaushikbhai Punambhai, (4) Rakesh Khushalbhai, (5) Punambhai garagevala (6) Vinod garagevala and (7) Raju, were prosecuted of the offences punishable under sections 147, 148, 149, 323, 324 of I.P.C., section 135 of the Bombay Police Act and section 3(1)(x) of the Scheduled Castes and Scheduled Tribes

(Prevention of Atrocity) Act. It is true that none of the prosecution witnesses examined in the present case has offered any explanation regarding injuries sustained by the appellant or other accused, but that by itself is of no consequence, more particularly when evidence of prosecution witnesses is found to be cogent, reliable and consistent. In view of cross case, naturally the witnesses would refrain from giving explanation regarding injuries to the accused, but non-explanation of injuries by itself cannot bring the case of the appellant under section 304 Part-II I.P.C. In view of the specific and clear evidence tendered by eye witness Kirit Hasmukhbhai Rana, there is no manner of doubt that first of all free fight had taken place between the accused party and the prosecution party and thereafter the appellant had inflicted a blow with knife on the left side chest of the deceased. Having regard to the injuries sustained by the appellant and the tenor of defence suggested to the witnesses, we are of the opinion that the appellant had exceeded his right of self-defence while exercising the same and caused death of the deceased. Therefore, the case would fall within the Exception to Section 302 I.P.C. and the appellant is rightly convicted under section 304 Part-I of I.P.C. and conviction of the appellant under section 304 Part-I deserves to be upheld. However, we find that for the offence punishable under section 304 Part-I of I.P.C., the learned Judge has imposed R.I. for 12 years and fine of Rs.200/- i/d imprisonment of one month. Section 304 I.P.C., inter-alia, provides that whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death. A bare reading of the above quoted provisions, makes it evident that the punishment which can be imposed under section 304 Part-I I.P.C. may be imprisonment for life or imprisonment of either description for a term which may extend to ten years. The learned Judge could have awarded imprisonment for life after recording reasons for it, but the learned Judge has not imposed imprisonment for life on the appellant. The other punishment viz. imprisonment of either description could have extended to ten years and, therefore, we are of the opinion that the learned Judge was not justified in imposing imprisonment of 12 years while punishing the appellant for having committed the offence under section 304 Part-I I.P.C. As observed earlier, the incident in question was fall out of an

earlier incident which had taken place on the previous day, wherein hot exchange of words had taken place between the brother of the complainant and the appellant following collision of hands while playing Garba. There was a free fight between the accused persons and the prosecution witnesses. Seven accused including the appellant had received injuries. The record of the case does not show that the appellant had tried to take undue advantage of the situation or had acted in a cruel manner, though he himself had received three injuries. The appellant is a young married person and has family. It could not be brought on the record by the prosecution that over and above the involvement of the appellant in the present case, he had bad antecedents. The record of the case on the contrary shows that this was the first offence committed by the appellant. Taking clue from the decision of the Supreme Court in Bachan Singh & others (supra), we are of the opinion that interest of justice would be served if sentence of R.I. for 12 years is reduced to sentence for a period of 7 years.

For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant under section 304 Part-I of the Indian Penal Code is hereby confirmed, but the punishment of R.I. for 12 years imposed on the appellant by the learned Sessions Judge is hereby set aside and instead the appellant is punished with R.I. for 7 years. The punishment of fine as well as punishment imposed in default of fine, are hereby confirmed. The appeal is accordingly allowed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal, J.)

(J.R.Vora, J.)

(patel)